UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

UNITED PARCEL SERVICE

and **CASES** **9-CA-39862**

PORTER LADY, an Individual

and
9-CA-39863

KELLY SOUTHWORTH, an Individual

and **9-CA-39868**

MELISSA CURRY, an Individual

and **9-CA-39981**

TOM MOXLEY, an Individual

TEAMSTERS UNITED PARCEL SERVICE NATIONAL NEGOTIATING COMMITTEE on behalf of **INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO** and its affiliated **LOCAL UNION NO. 89 (UNITED PARCEL SERVICE)**

and	**CASES**	**9-CB-10817**
PORTER LADY, an Individual		
and		**9-CB-10818**
KELLY SOUTHWORTH, an Individual		
and		**9-CB-10821**
MELISSA CURRY, an Individual		
and		**9-CB-10851**
TOM MOXLEY, an Individual		

Eric Oliver, ***Esq***., and
Linda Finch, Esq.
for the General Counsel.
David Hoskins, ***Esq***.,
for the Respondent Employer.
Michael T. Manley , Esq., and
Gary Witlen, Esq.,
for the Respondent Union.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, **Administrative Law Judge**: This case was heard before me on October 5 and 6, 2004, in Louisville, Kentucky. The Consolidated Complaint is based on charges filed by Porter Lady, an Individual, Kelly Southworth, an Individual, Melissa Curry, an Individual and Tom Moxley, an Individual and contains allegations against both Teamsters United Parcel Service National Negotiating Committee on behalf of International Brotherhood of Teamsters, AFL-CIO and its affiliated Local Union No. 89 ("the Teamsters or "the Union") and United Parcel Service

("UPS" or "the Employer"). The complaint alleges that Respondent Teamsters and UPS unlawfully accreted the international auditors and ODC/FDC clerks into a nationwide bargaining unit[1] at a time when the Union did not represent a majority of these employees. Pursuant to a contingent settlement reached between Region 9 of the National Labor Relations Board ("the Board") and UPS, a motion was made at the hearing on October 5, 2004, to sever cases 9-CA-39863, 9-CA-399868 and 9-CA-39981. I granted the motion and these cases were severed from the Consolidated complaint. The complaint had alleged that Respondent UPS had violated Section 8(a)(1) and (2) of the National Labor Relations Act ("the Act") by recognizing the Respondent Union as the collective bargaining representative of the following group of employees:

> FDC/ODC clerks and international auditors who work in [Respondent UPS] operation facilities.

and by applying, maintaining and enforcing the terms of the collective-bargaining agreement between the Union and UPS to the foregoing unrepresented employees described above even though these employees had not designated the Union as their collective bargaining representative, and by maintaining and enforcing the provisions of the collective-bargaining agreement that requires employees as a condition of employment, to become and remain members in good standing of the Union, and by deducting monies from the wages of these employees and remitting those funds to Respondent Union as initiation fees and/or dues. The complaint alleges that by the foregoing conduct UPS has encouraged its employees to join and support the Union, and has unlawfully accreted these employees into the bargaining unit.

The complaint alleges that the Union engaged in conduct in violation of Section 8(b)(1)(a) by accepting monies that UPS deducted from the wages of the aforesaid employees as initiation fees and/or dues and that the Union has been attempting to cause the employer to discriminate against the aforesaid employees in violation of Section 8(b)(2) of the Act. The Respondent Teamsters has filed its answer to the complaint denying the commission of any violations of the Act.

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1 The complaint alleges, Respondent admits and I find the appropriate unit is:

> Where already recognized, all feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), car washers, [Respondent Employer's] employees in [Respondent Employer's] air operation, to the extent allowed by law employees in the export and import operations performing load and unload duties, other employees of [Respondent Employer] for whom a signatory local of [Respondent Union] is or may become the bargaining representative. In addition, effective August 1, 1987, [Respondent Employer] recognized as bargaining unit members clerks who are assigned to package center operations, hub center operations, and/or air hub operations whose assignment involves the handling and progressing of merchandise, after it has been tendered to [Respondent Employer] to effectuate delivery. These jobs cover: package return clerks, bad address clerks, post card room clerks, damage clerks, rewrap clerks, the hub and air hub return clerks. This Agreement also governs the classifications covered in Article 39 – Trailer Repair Shop. Effective no later than February 1, 2003, [Respondent Employer] recognizes as bargaining unit members "smart label" clerks and revenue auditors who work in the operations facilities.

Upon consideration of the testimony of the witnesses, the exhibits received in evidence at the hearing and the briefs of the General Counsel and Respondent Union, I make the following:

Findings of Fact and Conclusions of Law

A. The Business of the Employer

The complaint alleges Respondents admit and I find that at all times material herein, the Employer has been a corporation with offices and places of business in various States including its place of business in Louisville, Kentucky and has been engaged in the interstate transportation of freight and distribution of parcels, that during the past 12 months, the Employer in conducting its aforesaid operations performed interstate freight transportation services valued in excess of $50,000 and received gross revenues in excess of $500,000 as a link in the interstate movement of freight and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. The Labor Organization

The complaint alleges Respondent Union admits and I find that at all times material herein, the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

I. Facts

The facts of this case are largely undisputed. The Union has been a party to a national contract with UPS since 1979. More than 1,000 UPS facilities across the country are covered by the current labor agreement effective from August 1, 2002 through July 31, 2008. The UPS in Louisville, Kentucky, is the facility at which the Charging Parties were employed when the charges in this case were filed. In 1985, UPS opened its initial air hub in Louisville and used approximately 15 to 20 non-bargaining unit employees to perform international auditing work. International auditors (a.k.a. document auditors) at the Louisville hub were employed on the export work removing invoices from packages and insuring they contained sufficient information to ensure that the packages were shipped to their intended destinations. Michelle Darnel testified that she commenced work as an international export auditor 15 years ago and that she and other international auditors were not represented by the Union until 2002. She testified that her auditing responsibilities included key entry as well as auditing. She worked as an international auditor until she was assigned invoice sort/ODC work in the late 1990s. Louisville employees who were assigned import auditing scanned packages to facilitate their release following customs inspections. During this process “released” and “held” labels were inserted on the packages and RF scanners were used to identify their status.

From approximately 1985, until the Louisville international operations moved into the World Port building in July 2002, the import and export functions were housed in

a facility and were divided by a concrete wall dividing the non-bargaining unit export and import personnel from the unit employees. Since July 2002, the import operation at the Louisville hub had been restricted to a secured area controlled by U.S. Customs and a special identification badge is required to enter it. The export operation is outside the secured area. Prior to their accretion to the bargaining unit the import employees had only limited contact with the unit employees. UPS established export hubs in Ontario, California in 1987, and in Philadelphia, Pennsylvania in 1989. The three hubs were the primary gateways used to export items to other counties. The export work at all three hubs was assigned to non-bargaining unit employees.

UPS decentralized its export function by creating Origin Data Capture (ODC) sites in 1994. This facilitated the process of handling international packages at origin centers which were close to shippers. ODC clerks worked as non-bargaining unit employees performing the same duties as the international auditors at the primary export gateways did. Approximately 117 new ODC sites were established from 1994 to 1998 and document auditors and/or ODC key entry personnel were assigned the international auditing function.

By 2000, the ODC centers were converted into flexible data capture (FDC) sites. The document auditor and key entry positions were combined into one job function and there was a blending of functions between the bargaining unit and non-unit positions at some of the smaller ODC/FDC sites but this did not occur at the Louisville, Ontario and Philadelphia hubs. The import auditors at the Louisville hub did not work in the same area as the unit employees and former employee Kelly Southworth who worked in the import section of the Louisville hub testified she rarely had contact with unit employees prior to the 2000 accretion. Former employee Michelle Darnel testified that unit employees worked in the same area as the export auditors, but were assigned non-auditing work. Former employee Melissa Curry testified that the administrative assistant, document auditor and international auditor are different names for the same position. She testified that management began referring to her crew as international auditors when they moved into the World Port building. Employee Porter Lady and Kelly Southworth testified they worked in the imports section of the Louisville hub and were classified as administrative clerks. Lady testified that there were approximately 60 administrative clerks who performed scanning work in his section. I credit the foregoing testimony of Curry, Lady and Southworth.

International auditing work was a non-bargaining unit function when the ODC sites were instituted. The accretion issue was not a matter of concern prior to the bargaining for the 2002 labor agreement when the parties agreed that effective no later than February 1, 2003, UPS international auditors and ODC/FDC clerks would be recognized as bargaining unit employees. On December 12, 2002, UPS' human resources representative Mike Warner conducted meetings at the Louisville hub and informed the non-unit import and export employees that they must either agree to be transitioned into the bargaining unit or resign. All of the Charging Party employees who testified at the hearing elected to be transitioned into the bargaining unit rather than resign. As unit members they were informed that they were subject to union dues, their

insurance was converted from Blue Cross/Blue Shield to Aetna and that December 29, 2002 would be their new seniority date. Employees Lady and Darnel received a wage increase as a result and Southworth and Curry's pay was red circled as their wage rates exceeded the union scale. As a result of fewer hours assigned to union employees, the employees received a decrease in earnings. Vacation benefits were also decreased as a result. Dues from the transitioned employees were received by the Respondent Union and the 2002 contract was applied to those employees without a card check or a Board conducted election.

II. Contentions of the Parties

1. General Counsel's Position

The General Counsel contends in brief as follows: The Board follows a restrictive policy in permitting accretions citing *United Parcel Service*, 303 NLRB 326 (1991) enfd. 17 F.3d 1518 (D.C. Cir. 1994, (cert. denied, 513 U.S. 1076 (1995), and prohibits the accretion of a classification of previously unrepresented employees in existence at the time of recognition or certification but not covered in an ensuing collective-bargaining agreement citing *Laconia Shoe Company, Inc.*, 215 NLRB 573, 576 (1974). Parties are found to have acted timely where an accretion issue is dealt with prior to a successor agreement. A group of employees that have been excluded from an existing unit for a significant period of time can only gain entrance into the bargaining unit by a representation election or a card check. It is the historical exclusion of a disputed classification from the bargaining unit that is determinative in assessing the legality of an accretion, *United Parcel, supra*. It is inconsequential that the union in question may or may not have acquiesced to the historical exclusion. It is not necessary to apply a community of interest standard.

In the instant case Ken Hall, the Union's chief negotiator testified that he was not aware of the ODC/FDC classification until 2000. However, the Union's knowledge of the ODC classification is established by an October 25, 1995, representation petition that was filed by Teamsters Local 63 and which sought a unit of ODC clerks. However, it was not until 2002, that the parties negotiated an agreement to place the ODC/FDC clerks into the unit without an election or card check. In view of the Union's knowledge of the ODC classification by October 1995, it was obligated under Board policy, to address the ODC's bargaining unit status before the 1997 contract was executed. Its failure to do so precludes a finding of a lawful accretion in 2002. UPS' traditional treatment of the international auditing function as bargaining unit work at certain of its facilities, does not bar a finding of an unlawful accretion under circumstances in which other UPS' facilities historically assigned the work to non-unit personnel. The Union presented evidence that export auditors at various UPS centers had traditionally been included in the bargaining unit. In reliance on *Lockheed Martin Tactical Aircraft Systems*, 331 NRLB 1407 (2000), the Union contends that the employees in the disputed classifications were not accreted but were given an opportunity to follow bargaining unit work that had seeped out of the unit. However, the international auditing function in Louisville, Ontario and the original ODC sites was classified as non-bargaining unit work from its inception. Therefore insofar as these facilities are concerned the inclusion of the international auditors and

ODC/FDC clerks in the unit was not merely a way of reclaiming bargaining unit work. As in the prior *United Parcel Service* case, *supra*, the disputed classifications here consist of a combination of represented and unrepresented employees who performed the same job functions at different UPS facilities. The historical exclusion of the international auditors and ODC/FDC clerks at some of the UPS facilities compels a finding that they, in the absence of an election or card check were the subjects of an unlawful accretion.

2. <u>Respondent Union's Position</u>

The Respondent Union contends in brief as follows: An accretion analysis is inappropriate. It argues that under *The Sun*, 329 NLRB 854 (1999) the Board established a different test to be applied in situations such as the instant case, where the bargaining unit is defined primarily by the work performed, as opposed to job classifications or titles. The Board began its analysis by noting:

> Where, as here, the scope of a unit is defined by the work performed, it is necessarily that scope which is central to the Board's analysis, and the Board and courts have accorded special significance to that unit scope 329 N.L.R.B. at 857.

After an extensive review of prior precedent, the Board announced the following standard:

> Accordingly, we shall apply the following standard in unit clarification proceedings involving bargaining units defined by the work performed: if the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate 329 N.L.R.B. at 859.

The Union has demonstrated that the work performed by employees now classified as ODC/FDC clerks or international auditors is the same work that either was performed by members of the bargaining unit in those locations in which the work was diverted during the 1999 – 2000 period or which has been performed consistently by members of the bargaining unit in those locations where the work remained in the bargaining unit throughout the transition to computers. The parties to the instant agreement agreed to clarify the contract to explicitly provide that auditing of international packages was bargaining unit work, regardless of the titles UPS created to classify the individuals performing that work. The question is whether General Counsel has met its burden to demonstrate that "the new group is sufficiently dissimilar from the unit

employees" so as to negate their inclusion in the existing unit. Traditional community-of-interest factors must be applied. However, "a showing that technological innovation has affected unit work will not suffice to exclude new classifications" unless the changes are such that the unit would no longer make sense if the disputed employees were included. The new employees would be added to the existing unit if the only significant differences in the work performed were the result of "improved methodology and increased efficiency brought on by computer technology." Reliance on community-of-interest factors such as wage rates that are solely within the employer's control are usually not appropriate to rebut the presumption. 329 N.L.R.B. at 859. The standard in *The Sun, supra,* supports the inclusion of the International Auditors and ODC/FDC clerks in the existing unit represented by the Teamsters. The language in the collective-bargaining agreement broadly defines the bargaining unit to include any clerical work that "involves the handling and processing of merchandise, after it has been tenured to United Parcel Service to effectuate delivery."

The evidence establishes that, when UPS initially decentralized the international audit function in the early 1990s it was the work of physically auditing the international package and the accompanying weigh bill and invoice which was assigned to bargaining unit members. In 1998 to 2000, UPS added duties requiring employees handling international packages to both physically inspect the package and weigh bill and enter shipping information into a computer. Some center managers, citing the additional duties, attempted to remove the work from the bargaining unit while other managers left the work with the unit. The work performed by bargaining unit members prior to 1998-2000, was functionally similar to the work performed by the newly created ODC Clerk position. UPS initially referred to the new classification as "document auditor," then "international auditor" and finally after further computer refinements, "ODC clerk." The work performed by the new ODC position was identical to the work performed by bargaining unit members. The only differences between the work performed by ODC employees was the direct result of "the improved methodology and increased efficiency brought on by computer technology. Thus the presumption that the new employees should be added to the bargaining unit is not overcome.

There is a different standard for recapturing prior unit work. *In Lockheed Martin, supra,* the parties had been signatory to successive collective-bargaining agreements, all of which excluded salaried professional and administrative employees (P&A) in the Graphic Arts department from the bargaining unit. The Union perceived that the employer was assigning bargaining unit work to P&A employees. The Union filed numerous grievances. During bargaining for a new contract in 1993, the parties agreed to conduct an audit of various jobs to determine whether the disputed tasks were bargaining unit work. An audit showed that twenty-six (26) of seventy-six (76) P&A jobs consisted primarily of unit work. These jobs were reclassified as bargaining unit positions. The non-bargaining unit employees who had been performing the work were permitted to "follow the work" and were offered an opportunity to transfer into the bargaining unit. The Administrative Law Judge "ALJ" in *Lockheed* found the reclassification to be an unlawful accretion. The Board reversed, finding accretion principles to be inapplicable because:

> The Respondent and the Union did not attempt to expand the unit by adding the P&A job classification to the unit. Rather, they sought to adhere to the scope of the bargaining unit to which they had agreed by returning unit work to the unit to be performed by employees in the job classification that, by their agreement, should have been performing the work all along.

The Board rejected the argument that its conclusion ignored the Section 7 rights of the affected employees. As in *The Sun*, *supra*, it equated the rights of affected employees to those of a newly hired employee accepting a position in an established appropriate bargaining unit represented by a union who does not have the "right to choose to perform bargaining unit work but be unrepresented by the union . . . " 331 NLRB at 1408, n. 5. In both cases, work that had been previously assigned to bargaining unit employees was taken away and given to non-unit personnel. In both cases numerous grievances were filed protesting the reassignment of unit work to non-unit personnel. In both cases the parties elected to resolve the issue by agreeing to return the work to the bargaining unit and rather than terminating the non-unit employees who were performing the work, they were given the opportunity to transfer into the unit. In both cases the unit was not expanded by adding a previously unrepresented classification but the unit work was returned to the unit.

In the instant case the General Counsel does not dispute that bargaining unit members in certain cases previously performed or currently perform international audit work. General Counsel appears to argue that, even if UPS previously assigned international audit work to unit employees, UPS and the Teamsters were not free to add the new ODC employees to the bargaining unit because, when UPS originally began performing the international audit work, the specific classifications of employees involved were not part of the bargaining unit. This argument was made by General Counsel in *Lockheed* and ignores the fact that it is the "work" that was lawfully recaptured by the union and returned to the bargaining unit, not the individual employees or classification of employees who were offered the opportunity to follow their work into the bargaining unit.

The Board's decision in *United Parcel Service*, *supra*, concerned the appropriateness of an agreement between the Teamsters and UPS to extend the bargaining unit to include all operations clerks working for UPS nationwide. The evidence in that case had established that prior to 1979, Teamsters' locals entered into individual bargaining relationships with UPS facilities operating within each local's jurisdiction. Operations clerks were included in some, but not all of these bargaining units. In 1979, when the Teamsters and UPS bargained their first National Master Agreement, the recognition clause included operations clerks, "where already recognized." The Union attempted to expand the unit to include all operations clerks during negotiations for a successor master agreement in 1982, but was unsuccessful. During the 1987 negotiations, UPS agreed to modify the recognitional language to include the remaining operations clerks. There was no dispute that the duties associated

with the operations clerk job remained the same between 1979 and 1987. The Board found the addition of the previously unrepresented operation clerks to be an unlawful accretion. The Board cited and relied on earlier decisions which held that accretion is inappropriate where the group sought to be added either existed at the time of the original recognition or certification or came into existence during the term of an agreement but was not subsequently included in the larger unit. The Board amplified this principle:

> The limitations on accretion discussed above and applied in *Laconia Shoe* and related precedent require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative*. 303 N.L.R.B. at 327

Since the operations clerks at issue had historically been excluded from the unit and there was no evidence that the Teamsters had ever demonstrated majority support among these clerks, the Board found the 1987 agreement to be unlawful.

Respondent Teamsters contends that the earlier UPS case is distinguishable from the instant case before me as although the bargaining unit in the earlier UPS case included some operations clerks, the particular clerks it sought to add had historically been excluded from the unit. In the instant case before me, Respondent contends that international audit work had historically been assigned to bargaining unit employees at different UPS centers scattered throughout the country. While UPS sought to remove this work from some centers in 1999, at other centers bargaining unit members continued to perform international work up to the date of the hearing in the instant case. However, the operations clerks in the earlier UPS case had never been part of the unit. They had been excluded by a unit definition the parties had voluntarily agreed to when the multi-union master agreement was formed. The Union eventually changed its view and sought to expand the unit to include the previously excluded clerks. Thus an argument could not be made that the Teamsters were seeking to recapture work that "seeped out" or had otherwise been lost from the unit. However in the instant case before me the work here had initially been assigned to the bargaining unit in recognition of the fact that the work "involves the handling and processing of merchandise," which is the functional description of the bargaining unit in the contract. When UPS then attempted to move this work as in *Lockheed, supra,* the Teamsters sought to retain and recapture what was already theirs.

As in *Lockheed, supra,* the effect of the agreement between the parties was to transfer the <u>work</u> performed by auditors, as opposed to the classification itself, back into the unit. In the early 1990s, when UPS began assigning international work to the bargaining unit, it did not reclassify the members to whom the work was assigned. The bargaining unit members who testified indicated they were classified by various titles such as "clerk," "international auditor," "air personnel," "package handlers," "international clerk," "counter clerk," "evening clerk," "air recovery and ADG auditor," or "unloader and clerk." When UPS removed the work from the unit in 1999, it did not

lay off the bargaining unit members who had been handling international packages, but simply reassigned them to other tasks. When the parties agreed to return the work to the unit, the non-unit employees who had been performing the work were afforded the opportunity to follow the work into the unit. Therefore it was the work and not the classification that was incorporated into the unit. This fact distinguishes the instant case from the Board's recent decision in *Kaiser Foundation Hospitals*, 343 NLRB No. 8 (2004). In *Kaiser, supra*, the Board found the parties' agreement to add the classification of research assistant to the existing unit to be an unlawful accretion. The Board found that unlike *Lockheed, supra*, the parties did not conduct any audit of the research assistants' duties, but simply transferred the entire classification into the unit. In the instant case no audit was necessary, since bargaining unit members had been doing the work and union officials were well aware, through the numerous grievances filed, of the nature of the work being performed.

Respondent contends that the General Counsel's focus on the prior UPS case is misplaced as it involved the traditional accretion scenario, where parties attempt to expand the unit to include employees performing the work that had never been performed by bargaining unit members. In the instant case, the work that was added to the unit was work that had historically been performed by bargaining unit members. Under these circumstances, the Board has held that the parties to a collective-bargaining agreement can reasonably decide that a bargaining unit, defined by the nature of the work performed, includes additional specified job classifications and duties, and includes employees performing the work that had never been performed by bargaining unit members. In the instant case, the work that was added to the unit was work that had historically been performed by bargaining unit members. Under these circumstances, the Board has held that the parties to a collective-bargaining agreement can reasonably decide that a bargaining unit, defined by the nature of the work performed, includes additional specified job classifications and duties, citing *Antelope Valley Press*, 311 NLRB 459 (1993); *The Sun, supra*.

The parties to a collective-bargaining agreement should not be compelled to utilize a unit clarification procedure in order to legitimatize their mutual agreement over the work functions covered by the contract. *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1677 (2000). In *Antelope Valley, supra*, and a companion case, *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993), the Board held that an employer may, upon reaching impasse, insist on transferring work out of the bargaining unit to non-unit employees so long as the employer does not either insist on changing the actual unit description or insist that the non-unit employees to whom the work is transferred remain outside of the unit. The Board held that, in such situations, the unit placement of the non-unit employees could be determined in either an unfair labor practice or unit clarification proceeding.

Analysis

The parties in their briefs have discussed in detail their respective positions as set out above concerning the bargaining unit issues with respect to the placement of non-

bargaining unit employees in the unit in order to "follow the work" of the international import and/or export work. They have discussed the historical context of UPS' movement into the business of international shipment of packages, the historical original placement of this work in the three large hubs of Louisville, Kentucky, Ontario, California and Philadelphia, Pennsylvania and the subsequent decentralization of the international work to several regional hubs.

Based on my review of the record I find that this case may be decided along factual patterns set by the historical events as viewed in the light of the prior UPS case. With respect to the charging parties Porter Lady, Kelly Southworth, Melissa Curry and Tom Moxley, I find the prior UPS case is controlling as contended by the General Counsel. The evidence disclosed that these non-unit employees had performed the international work at the Louisville, Kentucky center from its inception. Thus, this work had never been placed in the unit and these employees had never been in the unit. I find in agreement with General Counsel, that the historical exclusion of these classifications of employees performing the international work is the determinative factor in assessing the legality of the accretion of these employees into the unit. I find that since this group of employees had been excluded from the unit for a significant period of time, it can only gain legal entrance into the bargaining unit by a representation election or a card check, *Laconia Shoe*, *supra*. I thus find that the Respondent violated Sections 8(b)(1) and (2) of the Act by unlawfully accreting these non-unit employees into the unit and by causing the Employer to withhold Union dues from their wages and remitting these dues to the Teamsters Union and by causing the Employer to fail to remit these sums to the then existing health and insurance benefits. With respect to the practices at other of the UPS facilities, the Respondent produced evidence showing a myriad of practices at these facilities. In some cases the international work was originally assigned to and performed by the unit employees, subsequently removed from the unit employees and assigned to and performed by non-unit employees and later this work was assigned to the unit and the non-unit employees were permitted to follow the work into the unit and were accreted into the unit.

Conclusions of Law

1. The case against Respondent UPS was severed from this case and I make no findings of violations concerning the Employer.

2. The Respondent Union, by accepting exclusive recognition as the representative of a group of previously unrepresented UPS international auditors and ODC/FDC clerks, at a time when a majority of these employees had not designated the Union as their representative, and by entering into a contract with the employer as the collective bargaining representative and by receiving dues from the pay of certain previously unrepresented international auditors and ODC/FDC clerks, has engaged in unfair labor practices within the meaning of 8(b)(1)(A) and (2) of the Act.

The employees who were unlawfully required to transfer into the unit and subjected to the terms of the collective-bargaining agreement or who were required to

terminate their employment rather than follow the work into the unit shall be made whole for any loss of wages or benefits incurred by them as a result thereof. *Kaiser, supra*, see *American Tempering, Inc.*, 296 NLRB 699, 709 (1989), enfd. 919 F.2d 731 (3rd Cir. 1990).

Nothing in the recommended Order should be construed to authorize or require the withdrawal or revocation of any benefits that have been granted to the affected employees as a result of the imposition of the contract and the unlawful acceptance of recognition of the Respondent Union as the affected employees' representative. See *Brooklyn Hospital Center*, 309 NLRB 1163, 1164 (1992) enfd. 9 F.3d 218 (2nd Cir. 1993); *King Radio Corporation*, 257 NLRB 521, 527 (1981).

3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent Union engaged in certain unfair labor practices, I shall order that it cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act. Having found that Respondent Union, violated the Act by accepting recognition of a group of previously unrepresented international auditors and ODC/FDC clerks and applying the collective-bargaining agreement to these employees, I shall order Respondent Union to cease accepting such recognition and applying to these employees the terms of the 1997 collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement, unless or until the Respondent Union is certified by the Board as such representative. I shall also order that the Respondent Union reimburse the previously unrepresented international auditors and ODC/FDC clerks, present and former, for dues and initiation fees and any health and insurance premiums involuntarily exacted from them as a result of the unlawful application of the union-security clause in the collective-bargaining agreement, and on any loss of benefits sustained by them as a result of the unfair labor practices, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[2]

ORDER

The Respondent Teamsters, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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2 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Accepting exclusive recognition as the representative of a group of previously unrepresented UPS international auditors and ODC/FDC clerks at a time when a majority of these employees have not designated the Union as their representative, and entering into a contract with the employer as the collective bargaining representative of said unrepresented employees.

(b) Applying the terms of its collective-bargaining agreement of 1997, or any other agreement with the Union, to previously unrepresented international auditors and ODC/FDC clerks unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of these employees. Nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms established pursuant to such contract.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative actions:

(a) Reimburse all previously unrepresented international auditors and ODC/FDC clerks for any initiation fees, dues or other monies involuntarily exacted from them pursuant to application of a union-security clause in the 2002-2008, collective-bargaining agreement or any other agreement concerning the representation of the international auditors or ODC/FDC clerks and for any loss of benefits sustained by them as a result of any loss of insurance or benefits as a result of the unfair labor practices, with interest as set forth in the Remedy section of this decision.

(b) Post at its business offices serving members at any United Parcel service facility where previously unrepresented international auditors or ODC/FDC clerks are located, copies of the attached notice marked "Appendix."[3] Copies of the notice on forms provided by the Regional Director for Region 9, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

Dated at Washington, D.C.

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3 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of The United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lawrence W. Cullen
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT accept exclusive recognition as the representative of all previously unrepresented United Parcel Service, Inc. International Auditors and ODC/FDC clerks at a time when we are not designated as the exclusive representative by a majority of these employees.

WE WILL NOT apply the terms of our collective-bargaining agreement of 2002-2008, or any other agreement with United Parcel Service, Inc. to previously unrepresented international auditors and ODC/FDC clerks, unless and until we have been duly certified by the National Labor Relations Board as the exclusive representative of those employees.

WE WILL NOT in any like or related manner interfere with you in the exercise of your rights under the National Labor Relations Act.

WE WILL make whole all previously unrepresented International Auditors and ODC/FDC clerks for any initiation fees, dues, or other moneys involuntarily exacted from them and paid to us pursuant to application of a union-security clause in the collective-bargaining agreement executed on August 1, 2002, or any other agreement with United Parcel Service, Inc. in the manner set forth in The Remedy provisions of this Decision from the dates of their discharges until the date of a valid offer of employment or reinstatement.

TEAMSTERS NATIONAL
UNITED PARCEL SERVICE
NEGOTIATING COMMITTEE
AND INTERNATIONAL
BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS OF AMERICA, LOCAL
89, AFL-CIO, ITS AGENT

(Employer)

Dated: _____

By:_____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street - Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (513) 684-3663